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In the Supreme Court of the United States

OCTOBER TERM, 1996

THE DAILY NEWS OF LOS ANGELES, A DIVISION OF COOKE MEDIA GROUP, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that an established, merit-based wage increase program, which is fixed both as to its timing and eligibility criteria, but discretionary as to amount, is a term or condition of employment that the employer cannot unilaterally change without first bargaining with the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 73 F.3d 406. The supplemental decision and order of the National Labor Relations Board (Pet. App. 29a-58a) is reported at 315 N.L.R.B. 1236. The earlier opinion of the court of appeals remanding the case to the Board for reconsideration (Pet. App. 59a-75a) is reported at 979 F.2d 1571. The initial decision and order of the Board and the decision of the administrative law judge (Pet. App. 76a-98a) are reported at 304 N.L.R.B. 511.

JURISDICTION

The court of appeals entered its judgment on January 19, 1996. A petition for rehearing was denied on July 9, 1996. Pet. App. 99a-100a. The petition for a writ of certiorari was filed on October 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1986, petitioner assumed operational control of a daily newspaper, which it had purchased from the Valley News. Petitioner continued its predecessor's policy of annually evaluating the performance of each editorial department employee and using that performance review as the basis for increasing salaries. Pet. App. 4a. While the amount of the increase was discretionary, the sole criterion for determining the amount of the increase was merit. *Ibid.* The vast majority of eligible employees received some raise each year. For example, in 1986, 81.5% of the employees who received performance evaluations received merit raises; in 1987, 82.7% received merit raises; and in 1988 and the first five months of 1989, 89% received merit raises. *Ibid.*

On May 8, 1989, the Board certified the Los Angeles Newspaper Guild, Local 69, AFL-CIO (Guild), as the collective bargaining representative for all of petitioner's full-time and regular part-time editorial department employees in Washington, D.C., and at eight California locations. At the commencement of negotiations, the parties agreed to defer bargaining on economic issues until all non-economic issues had been resolved. Petitioner's negotiator also stated that, pending negotiations, petitioner was considering discontinuing the annual employee merit raises. The

Guild responded that it considered the merit-based wage increase program to be an existing condition of employment that petitioner could not unilaterally discontinue and that, during the course of bargaining, petitioner should continue to grant the increases to all employees on their anniversary dates. Pet. App. 5a. Shortly thereafter, petitioner terminated merit-based wage increases for employees who were part of the collective bargaining unit, although it did continue to issue annual performance appraisals for all employees. *Ibid.* At least two unit employees were subsequently informed at their annual performance appraisals that, based on their performance, they would have received increases but for the union negotiations. *Id.* at 5a-6a. Petitioner also continued to grant merit-based wage increases to those employees outside of the collective bargaining unit. *Id.* at 6a.

2. The Guild filed a complaint with the Board, which issued a decision and order on August 27, 1991. Pet. App. 76a-98a. The Board found that the merit-based wage increase program, although discretionary as to the precise amount of each individual increase, had nevertheless become a fixed term or condition of employment, which, under *NLRB* v. *Katz*, 369 U.S. 736 (1962), could not be discontinued without either the prior agreement of or bargaining with the Guild. Pet. App. 77a-78a. The Board concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by unilaterally withholding the annual merit increases from the unit employees. The Board ordered petitioner to cease and desist from that unfair labor practice and to make the employees whole for any monetary losses sustained because of petitioner's unlawful conduct. Pet. App. 80a, 94a.

The court of appeals remanded for further explanation and consideration of the Board's decision. In particular, the court directed the Board to reconcile its ruling with the Board's earlier decision in *Anaconda Ericsson Inc.*, 261 N.L.R.B. 831 (1982), and to clarify its interpretation of this Court's decision in *Katz*. Pet. App. 59a-71a.[1]

3. a. On December 31, 1994, the Board issued a supplemental decision holding that, under *Katz*, any unilateral change covering a mandatory subject of bargaining is unlawful regardless of the nature of the change or the particular term or condition affected. Pet. App. 33a-37a. The Board further noted that it had consistently applied *Katz* to find the unilateral discontinuance of merit raises to be unlawful whenever such raises had become established terms or conditions of employment. *Id.* at 40a-44a. Because *Anaconda Ericsson* could not be reconciled with other Board decisions, the Board overruled it. *Id.* at

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[1] The court also invited the Board to address on remand how the back pay remedy would be administered and whether the prohibition on wage and benefit decreases during negotiations was consistent with *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960), and *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965). Pet. App. 72a-75a. On remand, the Board concluded that the back pay due employees could be approximated based on available information. *Id.* at 48a-50a. The Board further concluded that *Insurance Agents* and *American Ship* were inapposite because petitioner's unilateral change in a term or condition of employment was a violation of the duty to bargain and, thus, could not be a lawful economic weapon. *Id.* at 50a-56a. The court of appeals affirmed the Board's ruling on those issues (*id.* at 19a-23a), and petitioner does not challenge those rulings here.

47a. The Board reaffirmed its finding of a violation and its prior remedial order. *Id.* at 56a-57a.

b. The court of appeals affirmed the Board's supplemental decision and enforced its order. Pet. App. 1a-28a. The court found that substantial evidence supported the Board's finding that, despite the discretionary amounts of salary increases, petitioner's merit-based wage increase program was "constrained both by the established procedures for evaluating employees and by the fixed criteria for making each individual merit decision." *Id.* at 13a. Petitioner thus "had instituted a pattern and practice of evaluating the unit employees at the time of each employee's anniversary date, and * * * as a result of such evaluation the [Company] would grant a discretionary merit salary increase to the employee in an amount commensurate with the employee's evaluation." *Ibid.* (emphasis omitted). The court concluded that "when the criteria for determining discretionary wage increases are fixed * * * *Katz* demands that the Company continue to apply the same criteria and use the same formula for awarding increases during the bargaining period as it had previously." *Id.* at 14a.

Judge Henderson dissented because, in her view, the annual increases were entirely discretionary and thus did not constitute "a 'fixed' term of employment or give employees any bankable expectations." Pet. App. 27a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is thus not warranted.

1. a. Petitioner contends (Pet. 7-14) that the court of appeals' ruling conflicts with this Court's decision in *NLRB* v. *Katz*, 369 U.S. 736 (1962). The National Labor Relations Act requires employers "to bargain collectively" and "in good faith" with employee representatives over "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(a)(5) and (d). In *Katz*, this Court held that an employer violates that duty by unilaterally changing a term of employment with respect to a mandatory subject of bargaining during the course (or in the absence) of negotiations. 369 U.S. at 743. Such unilateral action "amount[s] to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Id.* at 747. Accordingly, the Court ruled in *Katz* that the employer had violated the Act by granting, without notice to the union, merit increases to nearly half of its unit employees:

> Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such a case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the

> procedures and criteria for determining such increases.

Id. at 746-747.

The court of appeals' decision fully comports with *Katz*.[2] Petitioner unilaterally changed an established component of the employees' existing wage structure, while preserving it for non-union employees. True, *Katz* involved an addition to, rather than the termination of, existing benefits. But the operative concern in both cases is that the employer has unilaterally *changed* the existing conditions of employment without first bargaining with the employees' representative. Under *Katz*, "unilateral change"—not just unilateral change in a particular direction—violates the duty to bargain collectively and in good faith. 369 U.S. at 743. In both instances, the employer's action "is a circumvention of the duty to negotiate which frustrates the objectives of [the Act]." *Ibid.*; see also *id.* at 746-747 (distinguishing case where employer had already committed itself to providing raises); *Hyatt Corp.* v. *NLRB*, 939 F.2d 361, 370-371 (6th Cir. 1991) ("The focus of the inquiry, therefore, is on the existence of an established practice or status quo."); *Aaron Bros. Co.* v. *NLRB*, 661 F.2d 750, 753 (9th Cir. 1981); *NLRB* v. *Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970).[3]

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[2] Because petitioner's merit-based wage increase program involved employee wages, petitioner does not dispute that it was a mandatory subject of bargaining.

[3] Contrary to petitioner's contention (Pet. 13-14), the court of appeals' interpretation of *Katz* does not turn on whether the union wants the discretionary increases to continue or stop, but on whether the timing and criteria for awarding the discretionary increases are sufficiently fixed to be viewed by the em-

As the court of appeals found (Pet. App. 3a-4a, 12a-14a), substantial evidence supports the Board's determination that the merit-based wage increase program was an established part of petitioner's wage structure and thus could not be changed without bargaining. The program had been in place for numerous years and even predated petitioner's assumption of control over the paper. The policy has continued in effect for non-union employees. *Id.* at 6a.[4] The timing of the evaluation and the criteria dictating the size (if any) of a wage increase were established.[5] Employees "knew that they would receive annual merit increases based on an evaluation of their work: increases were denied *only* when an employee's evaluation was unsatisfactory (or when an employee was already at the top of the salary scale)." *Id.* at 14a; see also *id.* at 14a n.4 ("[U]nequivocal evidence in the record indicates that, prior to the Company's discontinuance of the merit-increase policy, a positive performance evaluation invariably corresponded to some form of wage increase."). The fact that the program contained a single discretionary component, regarding the amount of the wage increase, did not strip it of its status as an

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ployees as part of the established wage structure, and thus as a term or condition of their employment. In *Katz*, the merit increases could not be viewed as a term or condition of employment because they were entirely discretionary, whereas in this case the merit increases were sufficiently fixed to be viewed as part of the existing wage structure.

[4] Cf. *Dothan Eagle*, 434 F.2d at 99 ("Such discrimination between union and non-union personnel cannot be tolerated.").

[5] Petitioner's editor testified that, in general, no factors other than performance were considered by petitioner in calculating raises. Pet. App. 18a.

established wage program and thus a mandatory subject of bargaining. See *Hyatt*, 939 F.2d at 369.

Petitioner's alleged conflict with *Katz* thus depends upon a factual characterization of the wage increase program (as entirely discretionary) that the administrative law judge, the Board, and the court of appeals each rejected. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). The task of evaluating whether an agency's decision is supported by substantial evidence belongs "primarily" to the court of appeals: "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Accordingly, further review is not warranted.

b. The court of appeals' decision, moreover, is consistent with the rulings of other courts of appeals. See *Pegasus Broadcasting of San Juan, Inc.* v. *NLRB*, 82 F.3d 511, 512 (1st Cir. 1996) (alteration in established practice of providing merit-based salary increases prohibited, expressly following court of appeals' decision in this case); *Litton Microwave Cooking Prods.* v. *NLRB*, 949 F.2d 249, 252-253 (8th Cir. 1991) (discontinuation of merit-based wage increases violated Act), cert. denied, 503 U.S. 985 (1992); *Hyatt*, 939 F.2d at 369 ("The fact that a wage or merit increase is partly discretionary does not give an employer carte blanch[e] to forgo the increase.").[6]

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[6] Petitioner's claim (Pet. 14-16) that the court of appeals' decision conflicts with the rulings of other circuits is mistaken.

2. There is likewise no merit to petitioner's contention (Pet. 17-20) that the court of appeals' decision impermissibly forces concessions on a bargainable issue, contrary to *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952). See also 29 U.S.C. 158(d). First, petitioner did not raise that argument below, nor did the court of appeals address it. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992).

In any event, nothing in the Board's order (Pet. App. 94a-95a), or the court's decision enforcing it, imposes any limitation on the position petitioner may take regarding merit increases in any future bargaining. If petitioner sought agreement on a contract clause terminating the merit increases, bargained to impasse on that clause, and then implemented its terms, it would violate no provision of the Board's

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In *Phelps Dodge Mining Co.* v. *NLRB*, 22 F.3d 1493 (10th Cir. 1994), every aspect of the payments in issue—timing, amount, selection of employees to receive them, and manner of calculation—was discretionary. *Id.* at 1496-1498 & n.3. The employees thus had no "reasonable expectation[]" of receiving the payments, which were more appropriately characterized as "discretionary gifts rather than wages." *Id.* at 1498. *NLRB* v. *Nello Pistoresi & Son, Inc.*, 500 F.2d 399 (9th Cir. 1974), involved Christmas bonuses, not established wage increases, the short history and indefinite nature of which precluded any established expectation of remuneration. *Id.* at 400-401. Finally, in both *NLRB* v. *Rochester Institute of Technology*, 724 F.2d 9 (2d Cir. 1983), and *Roper Corp.* v. *NLRB*, 712 F.2d 306 (7th Cir. 1983), the employers had fulfilled their obligation to bargain before discontinuing merit increases. *Rochester*, 724 F.2d at 11-12; *Roper*, 712 F.2d at 309-311.

order. The court's ruling only prohibits petitioner from *unilaterally* eliminating merit increases and requires it to compensate employees for losses due to unilateral action already taken. Neither of those requirements compels a "concession" by petitioner. Rather, both relate to the process, rather than the substantive outcome, of collective bargaining, and this Court has recognized the Board's authority to supervise that process. See *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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